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ARBITRATION AGREEMENTS: THE PERFECT DEFENSE FOR LAW SCHOOL DECEIT

By
Jeremy Alm*

I. INTRODUCTION

Since the United States Supreme Court gave the Federal Arbitration Act a robust interpretation, arbitration agreements can be found in a variety of consumer contexts.¹ Even educational institutions are opting for Alternative Dispute Resolution (ADR) agreements with students.² Only a few law schools, however, are opting for arbitration agreements, even though law schools are increasingly targeted with litigation.³ It would seem that the uneasy future of some law schools might pose a prime place for arbitration agreements to take root.⁴ This article will serve as a warning that future law students

* Juris Doctor expected, Hamline University School of Law, 2014. The author would like to thank his wife for her encouragement and regular pep talks; Professor David Larson, Hamline University School of Law, for his inspiration and guidance; his family for their steadfast support; and the *Yearbook on Arbitration and Mediation* staff for the opportunity to publish his work and for their help.

¹ See *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding arbitration agreements should not be “subject to any additional limitations under state law”); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding “[c]ourts may not, however, invalidate arbitration agreements under state law applicable only to arbitration provisions”); *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (expanding the Federal Arbitration Act to include employment agreements); see also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (upholding an arbitration agreement in a “shrink wrap contract” that came with consumer’s computer purchase); *Wash. Mutual Fin. Grp. v. Bailey*, 364 F.3d 260 (5th Cir. 2004) (reversing lower court decision that arbitration clause was unconscionable because borrower was illiterate); *McKenzie Check Advance of Miss. v. Hardy*, 866 So. 2d 446, 454-55 (Miss. 2004) (holding that arbitration agreement was conscionable in check advance loan contract); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (holding that termite extermination services contract had a valid arbitration clause); *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903 (7th Cir. 2004) (upholding adhesion contract’s arbitration clause in tax preparation service contract).

² See ARGOSY UNIV., INSTITUTIONAL POLICES, ARBITRATION AGREEMENT, available at http://catalog.argosy.edu/content.php?catoid=21&navoid=1428#Arbitration_Agreement (last visited Apr. 7, 2014); DEVRY UNIVERSITY, ENROLLMENT AGREEMENT, available at <http://www.high-school.devry.edu/pdf/Passport2College.pdf>.

³ See also *Harnish v. Widener Univ. Sch. of Law*, 931 F. Supp. 2d 641 (D.N.J.2013); *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834 (N.Y. Sup. Ct. 2012); *MacDonald v. Thomas M. Cooley Law Sch.*, 880 F. Supp. 2d 785 (W.D. Mich. 2012) (students sued arguing they reasonably relied on faulty employment statistics); see generally *infra* notes 14-27 (discussing lawsuits against law schools and dwindling enrollment numbers). Some unaccredited law schools have opted for enrollment agreements with arbitration agreements. See CONCORD LAW SCHOOL, CONCORD LAW SCHOOL ENROLLMENT AGREEMENT, available at http://www.concordlawschool.edu/uploadedFiles/CLS_Concord_Law_School/Concord_Law_School_Documents/CLS%20Enrollment%20Agreement%20Oct%2012_CLICK%282%29.pdf (last visited Apr. 2, 2014). This is not meant to suggest, though, that any law school that opts for an arbitration agreement is inherently deceptive in nature.

⁴ Compare *Gomez-Jimenez*, 943 N.Y.S.2d at 843, with *Harnish*, 931 F. Supp. 2d at 654.

should be wary of the unfair protections of arbitration clauses.⁵ First, this article will illustrate how educational institutions contract regularly with students. Next, this article will propose why law schools could be tempted by the protective qualities of arbitration agreements. And finally, this article will compare the pros and cons of arbitration agreements to further illustrate the detriment such agreement would pose on current and prospective law students.

II. BINDING STUDENTS WITH IMPLIED CONTRACTS

Law schools contract with their students all the time. While formal contracts are not frequently used, implied contracts are often created when students exchange tuition for educational services.⁶ The terms and conditions of the implied contract are then established through any publication released by the educational institution, such as “catalogs, bulletins, circulars, and institution regulations given to the student.”⁷ If a law school chose to have its students agree to an arbitration agreement, all that would be required is for the school to place the clause in a school publication.⁸ In fact, the way schools contract with their students is analogous to the often-cited case *Hill v. Gateway 2000, Inc.*⁹

In *Hill v. Gateway 2000, Inc.*, the Plaintiffs bought a computer from the Defendant without first being given the terms and conditions (which included an arbitration agreement).¹⁰ The terms and conditions were sent with the computer, and the Plaintiffs had 30 days to reject the conditions of the purchase by sending the computer back for a full refund.¹¹ The Court upheld the arbitration agreement because “[c]ustomers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device.”¹² In the same light, law

⁵ See generally *infra* notes 38-46.

⁶ *Kashmiri v. Regents*, 67 Cal. Rptr. 3d 635, 650 (Cal. App. 1st Dist. 2007) (holding “no formal contract exists between the University and the professional student subclass, but that an implied contract was created by the students’ conduct when they accepted the University’s offer of enrollment”); see also *People ex rel. Cecil v. Bellevue Hosp. Med. Coll.*, 14 N.Y.S. 490 (N.Y. Sup. Ct. 1891), *aff’d sub nom. People ex rel. Cecil v. Bellevue Hosp. Med. Coll. of N.Y.*, 128 N.Y. 621, 28 N.E. 253 (N.Y. 1891).

⁷ *Zumbrun v. Univ. of S. Cal.*, 101 Cal. Rptr. 499, 504 (Cal. App. 2d Dist. 1972) (citations omitted).

⁸ Like any contract, contractual defenses can be used to invalidate such agreements. See *Miler v. Corinthian Coll., Inc.*, 769 F. Supp. 2d 1336 (D. Utah 2011) (upholding arbitration agreement as conscionable); *Brumley v. Commonwealth Bus. Coll. Educ. Corp.*, 945 N.E.2d 770 (Ind. Ct. App. 2011) (holding for-profit school’s arbitration agreement was not fraudulently induced); *Jung v. Ass’n of Am. Med. Colls.*, 300 F.Supp.2d 119 (D.D.C. 2004) (holding that arbitration agreement was not induced by duress).

⁹ *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997).

¹⁰ *Id.* at 1148; see also *Montgomery v. Corinthian Colls., Inc.*, No. 11 C 365, 2011 WL 1118942 (N.D. Ill. Mar. 25, 2011) (citing to *Hill*, 105 F.3d 1147 in determining that trade school was not required to read the arbitration agreement to students).

¹¹ *Hill*, 105 F.3d at 1148.

¹² *Id.* at 1149.

schools cannot be required to read the institution's materials line-by-line to incoming students. Instead, students are often given an opportunity to read through the rules and regulations of the educational institution. If they do not want to be bound by them, they can choose not to attend and receive a tuition refund after a certain amount of time.¹³

III. THE ARBITRATION TEMPTATION

A. Treacherous Times for Law Schools

The turbulent waters law schools are currently navigating could be calmed by arbitration agreements. Law student alumni are targeting their alma maters with an increasing number of lawsuits; in 2012, fifteen law schools combatted class-action lawsuits brought by over 75 graduates.¹⁴ The lawsuits were based on an assortment of claims, but primarily consumer fraud.¹⁵ The consumer fraud actions were founded on the allegedly fraudulent statistics that law schools reported to entice a fresh wave of 1Ls to attend.¹⁶ In essence, law school graduates claimed that the statistics were misleading about post-graduate employment opportunities.¹⁷ To make matters worse, courts sent mixed signals regarding the reliability of those statistics.¹⁸ This means that law schools may find themselves warding off consumer fraud actions until the courts have thoroughly established the confines of legitimate law school employment reporting practices. And while courts wrestle with that notion, the current legal industry illustrates why some law schools may choose to push the boundaries of reporting employment data.

¹³ See HAMLINE UNIV. SCH. OF LAW, REGISTRATION, <http://law.hamline.edu/registration.html> (last viewed Apr. 7, 2014) (giving students 10 days from beginning of class to drop without owing tuition or using a sliding scale after 10 days); UNIV. OF MINN. SCH. OF LAW, REFUND, DROP/ADD DEADLINES, <http://www.law.umn.edu/current/deadlines.html> (last viewed Apr. 7, 2014).

¹⁴ Vivian Giang, *A Bunch of Young Lawyers are Suing Their Law Schools Because They Don't Have Jobs*, YAHOO! FINANCE (Feb. 15, 2012, 2:56 PM), <http://finance.yahoo.com/news/bunch-young-lawyers-suing-law-195616601.html>.

¹⁵ See *Harnish v. Widener Univ. Sch. of Law*, 931 F. Supp. 2d 641 (D.N.J.2013) (graduates, including law students, suing for inability to find adequate employment); *Gomez-Jimenez v. N.Y. Law Sch.*, 943 N.Y.S.2d 834 (N.Y. 2012) (students sued over misrepresented law employment statistics); *MacDonald v. Thomas M. Cooley Law Sch.*, 880 F. Supp. 2d 785 (W.D. Mich. 2012) (students sued arguing they reasonably relied on faulty employment statistics).

¹⁶ See, e.g., *MacDonald v. Thomas M. Cooley Law Sch.*, No. 1:11CV00831, 2011 WL 3486444 at ¶¶ 34-41 (W.D. Mich. Aug. 10, 2011); *Alaburda v. Thomas Jefferson Sch. of Law*, No. 37-2011-000091898-CU-FR-CTL (Cal. Super. Ct. Aug. 21, 2012), available at <http://www.thomasjeffersonclassaction.com/pdf/Complaint-Documents.pdf>.

¹⁷ See, e.g., *MacDonald*, 2011 WL 3486444 at ¶¶ 34-41; *Alaburda*, No. 37-2011-000091898-CU-FR-CTL.

¹⁸ Compare *Gomez-Jimenez*, 943 N.Y.S.2d at 843 (holding that students that the statistics are accurate enough for students to make an informed decision about attending law school) with *Harnish*, 931 F. Supp. 2d 641 (denying law school's motion to dismiss because law student's claims were "plausible").

In June 2007, the legal market hit an all-time high for legal field employment opportunities.¹⁹ But in 2012, the legal market fell by 7.8% from that 2007 high.²⁰ The legal landscape has discouraged many from even attempting to enter law school.²¹ It is reported that the number of LSAT takers from 2012 to 2013 dropped 13%.²² Fewer LSAT takers equate to fewer applicants to fill seats in the over 200 accredited law schools nationwide.²³ Also, in 2013, the highly regarded U.S. News' law school rankings were rattled after the new scoring method knocked several low ranked schools off the list.²⁴ Employment placement rates now account for 20% of a law school's score.²⁵ This suggests that if a law school were ever going to tweak its numbers, now would be the ideal time in order to maintain its enrollment.

Law school employment figures, however, are not the only source of student-versus-law-school legal actions. Schools are also warding off lawsuits from students who are upset over school decisions, such as disciplinary or admissions decisions.²⁶ Other legal actions focus on more trivial matters, like a broken chair.²⁷ Even the most trivial

¹⁹ Annie Lowrey, *A Case of Supply v. Demand*, SLATE (Oct. 27, 2010, 4:14 PM), http://www.slate.com/articles/business/moneybox/2010/10/a_case_of_supply_v_demand.html (last visited Apr. 7, 2014).

²⁰ *Id.*

²¹ Elie Mystal, *If Associates Don't Get a Raise, Expect Even Fewer LSAT Takers*, ABOVE THE LAW (Mar. 14, 2013, 6:08 PM), <http://abovethelaw.com/2013/03/if-associates-dont-get-a-raise-expect-even-fewer-lsat-takers/> (last visited Apr. 7, 2014).

²² *Id.*

²³ Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs Are Cut*, NEW YORK TIMES (Jan. 30, 2013), http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html?_r=0 (last visited Apr. 7, 2014); AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order.html (last visited May 14, 2014).

²⁴ Debra Cassens Weiss, *US News Rankings Change With Better Jobs Data; Which Law Schools Are Now Unranked?*, ABA JOURNAL (Mar. 12, 2013, 7:05 AM), http://www.abajournal.com/news/article/new_jobs_data_spurs_changes_in_us_news_rankings_which_law_schools_are_now_u/ (last visited Apr. 7, 2014).

²⁵ Some schools that were the center of litigation, like New York Law School, fell off the rankings. Others were reported to have fallen 38 places in the latest round of rankings. *Id.*

²⁶ See *Al-Turk v. Univ. of Neb.*, No. 8:13CV74, 2013 WL 959223 (D.Neb. 2013); *Prete v. Roger Williams Univ. Sch. of Law*, Civil No. 12-cv-474-JL, 2012 WL 6203083 (D.N.H.2012) (student sued over alleged discriminatory practices in early admission decisions); *Chan v. Bd. of Regents*, Civil Action No. H-12-0325, 2012 WL 5832494 (S.D.Tex.) (students sued seeking readmission after being expelled for failing to meet academic requirements).

²⁷ The Daily Caller, *Law Student Sues School After She Fell Out of A Chair*, YAHOO! NEWS (Mar. 25, 2003), <http://news.yahoo.com/law-student-sues-school-she-fell-chair-123409276.html>; see also Staci Zaretsky, *Another Law School Sued, But This Time With Allegations of 'Negligent Enrollment'*, ABOVE THE LAW (Feb. 16, 2013, 1:32 PM), <http://abovethelaw.com/2012/02/another-law-school-sued-but-this-time-with-allegations-of-negligent-enrollment/> (last visited Apr. 7, 2014) (reporting that one law student is suing her school for allowing her to enroll when she allegedly was not qualified to attend).

suit may take years to reach a conclusion.²⁸ Thus, law schools can face a variety of ongoing lawsuits, and the use of arbitration agreements could prevent the courts from publically meddling in their affairs.²⁹ In fact, courts continue to erode the doctrine of academic abstention and more readily adjudicate cases they traditionally refused to resolve.

B. The Destruction of Judicial Abstention in Educational Affairs

Historically, the judiciary has hesitantly adjudicated disputes against educational institutions.³⁰ Experts theorize that the judicial branch's aversion to adjudicate educational institution issues stems from an inability to resolve disputes due to the schools' "polycentric nature."³¹ Universities' decisions "are products of complex interactions" that the judiciary cannot parse through in deciding an outcome.³² Courts would also not have access to every necessary party, because the law protects certain interests or relationships in the education context.³³ And in coming to a decision, courts would have to speculate the needs of higher education institutions, a task they simply could not accurately complete.³⁴

More recently, the historically hesitant courts are adhering to academic abstention in only a small number of cases regarding academic disciplinary and admission decisions.³⁵ This trend would likely leave courts with broad discretion over false advertising and consumer fraud lawsuits against the schools. The dissolution of academic

²⁸ *Lucero v. Curators.*, No. WD 74768, 2013 WL 519460 (Mo. Ct. App. 2013) (decided in 2013 after charges were filed in 2008 stemming from a 2007 charge against the school's faculty).

²⁹ See *infra* section III(c).

³⁰ See *Regents v. Ewing*, 474 U.S. 214, 226 (1985) ("[F]ar less is [the federal court] suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'" (citation omitted)); see also *Abdullah v. State*, 771 N.W.2d 246 (N.D. 2009).

³¹ Edward N. Stoner II & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O'Connor's Opinion in Grutter Reapplies Longstanding Principles, as Shown by Rulings Involving College Students in the Eighteen Months Before Grutter*, 30 J.C. & U.L. 583, 587 (2004) (citing James Leonard, *Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of the Americans With Disabilities Act*, 75 NEB. L. REV. 27, 74 (1996)).

³² *Id.*

³³ James Leonard, *Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of the Americans With Disabilities Act*, 75 NEB. L. REV. 27, 74 (1996).

³⁴ *Supra* note 31.

³⁵ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (holding a law school's admission criteria could use race as a basis to create a diverse community within the law school and that decision conformed to the "tradition of giving a degree of deference to a university's academic decisions . . ."); *Harwood v. Johns Hopkins Univ.*, 747 A.2d 205, 209 (Md. Ct. Spec. App. 2000) (holding courts must continue cautiously when dealing with university disciplinary actions).

abstention may be enough of a threat for law schools to contract arbitration agreements to maintain discretion over their affairs. Some proprietary schools have already taken the threat to heart.

*C. Follow the Leader: Proprietary Schools*³⁶

Recently, just like some law schools, proprietary schools have faced litigation due to employment statistics reporting.³⁷ In the past decade, commentators have targeted proprietary schools with harsh criticism. Critics argue that in order to compete with traditionally cheaper community colleges, “proprietary schools often must offer enrollment at comparable prices, increasing pressure on proprietary schools to maximize enrollment numbers and tuition payments.”³⁸ This places pressure on the schools to market aggressively and, in doing so, misrepresent employment prospects to potential students.³⁹ Because of these questionable tactics, for-profit schools are claimed to use arbitration agreements as a defensive measure to mitigate the legal and public damages of consumer fraud claims.⁴⁰ Additionally, recent case law favoring arbitration agreements can be cited as further incentive for proprietary schools’ use of arbitration clauses.

Experts argue that the Supreme Court’s recent decision in *AT&T Mobility LLC v. Concepcion* inhibits judicial review standards of proprietary schools’ fraudulent practices.⁴¹ This notion is hard to disagree with because many favorable court decisions for proprietary schools have relied on *Concepcion*.⁴² The holding in *Concepcion* is even

³⁶ For the remainder of this article, “proprietary school” will refer to “for-profit colleges and universities [that] are managed and governed by private organizations and corporations.” *For Profit Colleges and Universities*, NCSL (July. 2013), <http://www.ncsl.org/issues-research/educ/for-profit-colleges-and-universities.aspx> (last visited April 7, 2014).

³⁷ See *In re Kaplan Higher Educ. Corp.*, 235 S.W.3d 206, 208 (Tex. 2007) (involving students suing for-profit school for misrepresenting employment statistics); *Marshall v. ITT Technical Inst.*, No. 3:11-CV-552, 2012 WL 1565453 (E.D. Tenn. 2012) (student sued proprietary school claiming that institution misrepresented employment prospects).

³⁸ Patrick F. Linehan, *Dreams Protected: A New Approach to Policing Proprietary Schools’ Misrepresentations*, 89 GEO. L.J. 753, 757 (2001).

³⁹ *Id.* at 759 (citing *Delta Sch. of Com., Inc. v. Wood*, 766 S.W.2d 424 (Ark. 1989) (holding that school induced students to enroll based on false promises of salary and employment opportunities)). Additionally, disturbing statistics from 1992-1997 show fraudulent misrepresentations and deceptive marketing practices forced closures or removed federal loan eligibility from nearly 800 for-profit trade schools. *Id.* at 760 (citing Charles R. Babcock, *Loan Abuses by Some Trade Schools Leave Taxpayers with Big Bill*, WASH. POST, Oct. 29, 1997, at A1).

⁴⁰ See Amanda Harmon Cooley, *The Need For Legal Reform Of The For-Profit Educational Industry*, 79 TENN. L. REV. 515, 538-40 (2012).

⁴¹ Charles Pollack, *An American Crisis: Proprietary Schools and National Student Debt*, 1 Am. U. Bus. L. Rev. 137, 157-60 (2012). It is necessary to note that in *AT&T Mobility LLC v. Concepcion* the Supreme Court upheld an arbitration clause in a cellphone contract requiring arbitration for any legal disputes and disallowing class actions. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748-54 (2011).

being marked as a “serious blow to consumer class actions and likely foreclos[ing] the possibility of any recovery for many wronged individuals” as courts rule in favor of for-profit institutions.⁴³

Although, it is not only *Concepcion*’s holding that is establishing legal hurdles for student consumers. Additional precedent has established a defensive shield, allowing arbitration agreements to protect academic institutions from the ramifications of their allegedly fraudulent behavior.⁴⁴ The secretive nature of arbitration proceedings will not alert the public of any deceptive behavior. In fact, experts cite to the publicity of recent multi-million dollar settlements in proprietary school litigation as the motivation for other for-profit schools to stonewall class action lawsuits via arbitration agreements.⁴⁵ Thus, proprietary schools have laid the foundation for law schools to securely implement arbitration agreements and defraud aspiring lawyers if they so choose, so long as the arbitration agreements are conscionable.⁴⁶

⁴² See *Affiliated Computer Serv., Inc. v. Fensterstock*, 611 F.3d 124, *cert granted*, (U.S. Jun. 13, 2011) (No. 10-987) (remanding case back to US Court of Appeals for further consideration in light of *Concepcion*); *Marshall*, 2012 WL 1565453 (granting proprietary schools’ motion to dismiss based on principals in *Concepcion*); *Mitchell v. Career Educ. Corp.*, No. 4:11cv1581 TCM, 2011 WL 6009658 (E.D. Mo. 2011) (granting motion to dismiss Plaintiff’s claims of unconscionability of arbitration agreement with for-profit school). It is also necessary to note that *Concepcion* has been greatly cited in cases warding off class actions in other consumer contract contexts. See David Segal, *A Rising Tide Against Class-Action Suits*, N. Y. TIMES, May 5, 2012, http://www.nytimes.com/2012/05/06/your-money/class-actions-face-hurdle-in-2011-supreme-court-ruling.html?_r=0 (last visited Apr. 1, 2014).

⁴³ *Bernal v. Burnett*, 793 F.Supp.2d 1280, 1288 (D. Colo. 2011). In *Bernal v. Burnett*, students brought a class action against a trade school alleging misrepresentation of attendance costs, likelihood of job placement, and salary expectations upon graduation. *Id.* at 1282. However, prior to participating in classes, students signed an arbitration agreement. *Id.* at 1282-84. The court held the agreement could only be invalidated if the arbitration clause was found to be unconscionable and ultimately saw *Concepcion* creating “broad enough implications that it constitutes an intervening change in the applicable legal context.” *Id.* at 1285.

⁴⁴ See, e.g., *Bernal*, 793 F.Supp.2d at 1287-88 (compelling arbitration despite court being “sympathetic” towards Plaintiffs); *Marshall*, 2012 WL 1565453, at *5 (holding arbitration valid in dispute over misrepresented employment statistics).

⁴⁵ One proprietary school settled a lawsuit after cutting a check for \$40 million and offering up to \$20,000 refunds to some 8,500 students. *Supra* note 40, at 539 (citing Terence Chea, Culinary School Grads Claim They Were Ripped Off, MSNBC.COM (Sept. 4, 2011, 5:35 PM), http://www.huffingtonpost.com/2011/09/06/culinary-school-grads-ripped-off_n_950107.html). The culinary school later claimed that the case was too expensive to litigate. *Id.*

⁴⁶ *Bernal*, 793 F.Supp.2d at 1287; see also *Fallo v. High-Tech Inst.*, 559 F.3d 874, 876 (8th Cir. 2009) (holding arbitration provision was conscionable because it was not hidden in the student contract); *Brumley v. Commonwealth Bus. Coll. Educ. Corp.*, 945 N.E.2d 770 (Ind. Ct. App. 2011) (holding that arbitration agreement was conscionable despite students claiming they were not allowed to read the contract before agreeing to it).

IV. THE GOOD, THE BAD, AND THE UGLY TRUTH OF ARBITRATION CLAUSES IN LAW SCHOOLS

A. Arguments for Arbitration: Applying Education-Based Arguments

In general, arbitration is considered to be an amicable solution for students and their academic institutions, because it promises a fair and affordable solution compared to students' current outlets for grievances.⁴⁷

Traditionally, students who disagree with academic institutions' administration decisions have only two solutions: school committees or the court system.⁴⁸ However, it is suggested that a school committee can reflect an unfair tribunal to students, mainly because committees are often made up of a panel of school officials.⁴⁹ Furthermore, critics of committee reviews cite that members who make the determinations often lack experience or knowledge in dispute resolution techniques.⁵⁰ These same panel members also must continue to work with faculty members who were part of the dispute, making neutrality an even more difficult task.⁵¹ Higher-education institutions also often lack procedures or guidelines for the committee members to guide their decision, adding "confusion and uncertainty to the inherent unpleasantness of such decision-making."⁵² A student can sometimes appeal the decision if it is not deemed final, but only to a different panel of school administrators.⁵³ Alternatively to school committees, the student could chance judicial review, but that may lead to the dead-end of judicial abstention, as discussed above.⁵⁴ Regardless, judicial intervention is costly for both students and their respective institutions.⁵⁵ Thus, if arbitration is selected as the method of dispute resolution instead of these two traditional procedures, it could prove to be a useful tool to traverse the complex disputes of educational institutions.⁵⁶

⁴⁷ See generally Donna Biaklik et al., *Higher Education: Fertile Ground for ADR*, 49-Mar DISP. RESOL. J. 61 (1994). The author believes many of the arguments for arbitrating educational disputes can be applied universally and, in this case, to law schools.

⁴⁸ *Id.* at 61-62; see also *Academic Policy Manual, Academic Standards Policies, Academic Performance and Grading, Grade Changes*, ST. THOMAS SCHOOL OF LAW, <http://www.stthomas.edu/law/academics/academicpolicymanual/academicstandardspolicies/academicperformanceandgrading/gradechanges/> (last visited March 31, 2014) (requiring Grade Appeal Committee to determine grade disputes).

⁴⁹ *Id.*

⁵⁰ Biaklik et al., *supra* note 47, at 62.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Biaklik et al., *supra* note 47, at 62.

⁵⁴ *Id.*

⁵⁵ Biaklik et al., *supra* note 47, at 62.

⁵⁶ See *id.* at 64.

Since academic disputes can be intricate, retired professors or academic administrators from nearby institutions trained in ADR techniques could be selected to arbitrate.⁵⁷ Selected arbitrators would mitigate any unfair perceptions that may be inherent with school committees.⁵⁸ Furthermore, the transparency of arbitration clauses could establish procedures and time limits for students to follow, allowing for a more predictable process for students.⁵⁹ In allowing student claims to be arbitrated, two benefits would result.

First, the doctrine of academic abstention would be revived because arbitration agreements would, once again, solidify the historical deference of academic issues by the judicial branch.⁶⁰ Secondly, while not referenced in academic settings specifically, arbitration clauses are held to preserve reputations when matters “could have a significant impact on a disputant's reputation.”⁶¹ With research suggesting that an educational institution's reputation is key for attracting new students, it is understandable why a law school could benefit from an arbitration agreement.⁶² While persuasive, the forgoing reasons fail to take into account many inherent problems with using arbitration agreements.

B. Arguments Against Arbitrating: Applying Consumer Protection Arguments

At its most diluted form, investing in education is a consumer transaction.⁶³ For law students, it is an expensive transaction, no matter where a student opts to attend; the average tuition cost for a private school is \$40,585 a year, and \$23,590 a year for in-state students at a public institution.⁶⁴ In consumer situations, opponents of arbitration agreements believe that arbitration is not an alternate dispute resolution, but rather a modification of the substantive rights of consumers.⁶⁵ In other words,

⁵⁷ *Id.* at 65.

⁵⁸ *Id.* at 64.

⁵⁹ *Id.* at 65.

⁶⁰ See Biaklik et al., *supra* note 47, at 66.

⁶¹ ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PROCEDURE IN GEORGIA § 9:5 (3d ed. 2006).

⁶² Geoffrey N. Soutar & Julia P. Turner, *Students' Preferences for University: A Conjoint Analysis*, 16 INT'L J. EDUC. MGMT 40, 41 (2002) (citing L. Lin, *What are Student Education and Educational Related Needs?*, 25 MKTG. & RES. TODAY 199, 199-212 (1997) (suggesting that prospective students who had a positive attitude toward a university rated it more highly)).

⁶³ Consumer transaction is defined as “a bargain or deal in which a party acquires property or services primarily for a personal... purpose.” BLACK'S LAW DICTIONARY (9th ed. 2009).

⁶⁴ Karen Sloan, *Tuition is Still Growing; Despite Lagging Law School Applications, It Vastly Exceeds Inflation*, NAT'L L.J., <http://www.nationallawjournal.com/legaltimes/id=1202567898209/Tuition-is-still-growing?slreturn=20140320154713> (last visited May 14, 2014).

⁶⁵ Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act*, 12 J. CONSUMER & COM. L. 151, 153-54 (2009).

“consumer arbitration is often simply a way for a business to reduce the number of disputes, avoid the courts and juries, and achieve more favorable results”: a notion backed by empirical studies.⁶⁶

In some studies, arbitration agreements are cited as an easy way for businesses to maneuver around unfavorable laws.⁶⁷ Even if the law is substantially unfair to businesses, courts may never have the opportunity to overturn precedent if disputes avoid judicial review altogether.⁶⁸ But it seems that businesses will not risk facing financial damages in hopes of changing the law, especially when arbitration offers favorable results.⁶⁹ Additionally, arbitrators are not bound by the rules of the courts, which does not allow a consumer to adequately predict outcomes.⁷⁰ Adding to the unpredictability, arbitrators are not required to write reasons for their decisions nor publish them.⁷¹ Therefore, unlike the judiciary bound by the doctrines of stare decisis, arbitrators can often secretly make binding decisions regardless of what has happened in the past.⁷² It would seem that arbitration agreements would surreptitiously protect a law school’s reputation and finances, while substantially leaving current and prospective law students in the lurch.

C. Arbitration Agreements: The Cons Outweigh the Pros

The “pros” and “cons” of applying arbitration to law schools suggest that arbitration can serve either a beneficial or destructive function. However, since the bulk of disputes focus around law schools’ employment reporting practices, arbitration

⁶⁶ *Id.* at 154.

⁶⁷ See Alderman, *supra* note 65, at 154 (citing W. Scott Simpson et al., *The Source of Alabama's Abundance of Arbitration Cases: Alabama's Bizarre Law of Damages for Mental Anguish*, 28 AM. J. TRIAL ADVOC. 135 (2004) (finding that Alabama auto dealers, fearing substantial judgments against them from the current laws, enacted arbitration agreements to maneuver around the laws)).

⁶⁸ *Id.*

⁶⁹ A recent analysis of the credit card industry found the incentives surprisingly one-sided. Using available information, the Public Citizen found that the most-hired arbitrators awarded in favor of consumers 1.6 to 24.7 percent of the time and suggest the appeal of repeat business for arbitrators’ apparent bias. John O’Donnell, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS 16 (PUBLIC CITIZEN 2007), available at <http://www.citizen.org/documents/ArbitrationTrap.pdf>. The study cited to the financial incentives of repeat corporate business for the blatant biases. See *id.* Furthermore, the study found that, in some cases, cavalier arbitrators made up their own rules to the detriment of the consumer. *Id.* at 9 (finding that arbitrators gave automatic deadline extensions to corporate defendants that did not ask for them). *Contra* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 845-6 (2010) (“Consumers won some relief in 53.3% of the cases they filed and recovered an average of \$19,255; business claimants won some relief in 83.6% of their cases and recovered an average of \$20,648.”).

⁷⁰ Alderman, *supra* note 65, at 151 (citing Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 763 (2002)).

⁷¹ *Id.* at 155.

⁷² *Id.*

agreements would cripple current and prospective law students' rights as consumers.⁷³ Law schools could arguably hide behind arbitration agreements, like some proprietary schools reportedly do, and thus protect a crucial element of gaining new students: their reputations.⁷⁴

Arbitrators' awards are kept secret and would add to a possibly endless cycle of disputes.⁷⁵ For example, if a law student were to win an arbitrated dispute for misrepresentation, the award's secrecy would prevent other students from falling into the same deceptive trap (assuming one exists). The law school's reputation would remain publically untarnished and continue to attract aspiring lawyers.⁷⁶ This is arguably evidenced by the fact that proprietary schools remain a multi-million dollar business, drawing in an increasing number of students.⁷⁷ The accuracy of some proprietary schools' employment numbers are uncertain until either a student defensively voids the arbitration provision or an arbitrator's decision is made public.⁷⁸ Similarly, if law schools were to establish arbitration agreements, law students could not adequately protect themselves. But even if the awards were made public, there is still the possibility of bias.

The area of arbitration is relatively hazy when it comes to the utility of arbitration as an alternative dispute method.⁷⁹ Studies of the credit card industry point to inherent arbitrator biases.⁸⁰ There is little to suggest that arbitrators would not carry biases into a dispute between a law school and its students.⁸¹ In fact, the legal community is often cited as a tight-knit community where reputation is everything.⁸² Some of those

⁷³ See generally *Harnish v. Widener Univ. Sch. of Law*, 931 F. Supp. 2d 641 (D. N.J. 2013); *Gomez-Jiminez v. N.Y. Law Sch.*, 934 N.Y.S. 2d 834 (N.Y. Sup. Ct. 2012).

⁷⁴ See generally, *Cooley*, *supra* note 40; *Soutar & Turner*, *supra* note 62.

⁷⁵ See *Alderman*, *supra* note 65, at 155

⁷⁶ See generally *Soutar & Turner*, *supra* note 62.

⁷⁷ David J. Deming et al., *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?*, 26 J. ECON. PERSP. 139, 140 (2012) ("Fall enrollment in for-profit degree-granting institutions grew by more than 100-fold from 18,333 in 1970 to 1.85 million in 2009."); see also Michael Stratford, *Senate Report Paints a Damning Portrait of For-Profit Higher Education*, THE CHRONICLE OF HIGHER EDUCATION (July 7, 2012, 5:46 PM), <http://chronicle.com/article/A-Damning-Portrait-of/133253/> (Additionally, a recent U.S. Senate report shows that the for-profit education sector raked in roughly \$16 billion in revenue for the fiscal year or 2009).

⁷⁸ See generally *Miller v. Corinthian Coll., Inc.*, 769 F.Supp. 2d 1336 (D. Utah 2011); *Brumley v. Commonwealth Bus. Coll. Educ. Corp.*, 945 N.E.2d 770 (Ind. Ct. App. 2011); *Jung v. Ass'n of Am. Med. Coll., et al.*, 300 F. Supp. 2d 119 (D.D.C. 2004).

⁷⁹ See *supra* note at 69.

⁸⁰ See *id.*

⁸¹ 4 AM. JUR. 2D 709 § 2-7 (1975) (suggesting past relationships can lead to an arbitrator's bias).

⁸² Richard J. Vangelisti, *Professional Strategies for Dealing with Others' Conduct the Unprofessionalism Challenge*, OR. STATE. BAR BULLETIN, May 2008, at 30, 31-32 (suggesting the legal community is small and a lawyer's reputation precedes him).

communal ties go back to law schools and an arbitrator's alma mater.⁸³ In an effort to not destroy those ties, it can be suggested that an arbitrator may favor his alma mater or legal tie in making a decision. Even ADR experts suggest that co-workers will favor one another in dispute resolution settings.⁸⁴

V. *Conclusion*

Arbitration is a useful tool, but only if the tool matches the job. For law schools, there are many temptations to bind potential and current students to arbitrate disputes. However, arbitration agreements could hide a law school's potentially deceptive practices from current or prospective students. The damage this would cause to a student marks the necessity for preventing all laws schools from imposing arbitration agreements at all. Nevertheless, law schools are currently free to use arbitration agreements until there is successful legislative intervention.⁸⁵

⁸³ To locate arbitrators online, *see* <http://www.linkedin.com> (search "arbitrator" and view search results) (finding that the majority of people listed as arbitrators list a law school education).

⁸⁴ *See* Biaklik et al., *supra* note 47.

⁸⁵ Arbitration Fairness Act for Students, S. 3557, 112th Cong. (2012 S. Health, Educ., Labor, and Pension Comm.).